

FILED

MAY 22 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO GARIBALDI-LOPEZ,

Defendant - Appellant.

No. 05-10544

D.C. No. CR-03-00111-1-SOM

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding

Submitted May 15, 2006^{**}

Before: B. FLETCHER, TROTT, and CALLAHAN, Circuit Judges.

Mario Garibaldi-Lopez appeals from the sentence imposed following his guilty-plea conviction for conspiracy to distribute and possess with intent to distribute, and attempted possession with intent to distribute, 50 grams or more of

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 21 U.S.C. § 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

The judicial fact-finding that occurred at Garibaldi-Lopez's sentencing did not violate the Sixth Amendment because he was not sentenced pursuant to a mandatory guidelines scheme. *See United States v. Booker*, 543 U.S. 220, 245-46, 259-60 (2005). His contention that ex post facto principles prohibit the application of an advisory scheme to his sentencing is foreclosed by *United States v. Dupas*, 419 F.3d 916, 919-21 (9th Cir. 2005). Lastly, we reject Garibaldi-Lopez's contention that the district court's description of the offenses during the plea colloquy constituted a misstatement of the charges against him and led to an erroneous application of the sentencing guidelines.

We decline to address new contentions raised for the first time in Garibaldi-Lopez's reply brief. *See United States v. Wright*, 215 F.3d 1020, 1030 n.3 (9th Cir. 2000). Appellee's motion to strike reply brief is therefore denied as moot.

AFFIRMED.